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CONSTITUTIONAL LAW.

Tax Assessment: Due Process of Law

The defendant, in accordance with powers conferred by its charter, levied an assessment of a tax for the cost of street paving on abutting lands owned by plaintiff. The charter provided that after the apportionment of the assessment, the same should be published in some newspaper for ten days and that any complaints, etc., could be made in writing by land owners within thirty days, and would be heard and determined by the City Council before the passage of any assessing ordinance. Complaints were duly filed by the plaintiff, but no notice was given of time for a hearing and the assessing ordinance was passed without there having been any. *Held,* due process of law demands something more than a mere opportunity to submit written objections. He who is entitled to a hearing has a right to support his allegations by argument and proof. *Londoner* v. *City & County of Denver,* 210 U. S. 373.

In *Davidson* v. *New Orleans,* 96 U. S. 97, Mr. Justice Miller said concerning the "due process of law" clause, "there is wisdom in the ascertaining the intent and application of such an important phrase in the Federal Constitution by the gradual process of judicial inclusion and exclusion." In accord with this idea, the meaning of "due process of law" has been gradually worked out in a long line of cases.

In questions of the assessment of property to pay for improvements that have benefited it, the amount of each assessment depends upon the value of the property, and is therefore a judicial act. *Hagar* v. *Reclamation District,* 111 U. S. 701. For that reason property owners must be given an opportunity to be heard by the body making the assessment (*Central of Georgia Ry. Co.* v. *Wright,* 207 U. S. 127), but the state legislature may provide that such hearing shall be conclusive. *Hibben* v. *Smith,* 191 U. S. 310. The question of what notice of the levy of an assessment is necessary is one of appropriateness to the nature of the tax, and notice by publication has been held sufficient in the case of an assessment upon abutting real estate to pay for improvements. *Lent* v. *Tillson,* 140 U. S. 316.

In addition to the above interpretations of the "due process of law" clause as applied to this class of cases, we now have the decision of the principal case which stipulates just what kind of a hearing must be given to those affected before this sort of assessment of property is made final.

CONSTITUTIONAL LAW (Continued).

Credit Given to Judgments of Other States

A Mississippi statute prohibited certain forms of gambling in futures and inhibited its courts from giving effect to any contract based on such gambling. Two citizens of Mississippi made such a contract and arbitrated their dispute. The citizen in whose favor the award was made brought action thereon in a Missouri court. Evidence of the illegality of the contract in Mississippi was rejected and a verdict and judgment were rendered in favor of the plaintiff; and upon action brought upon such judgment, the Supreme Court of Mississippi decided that they were not bound by the Missouri judgment. On appeal the Supreme Court of the United States, by a five to four decision,

Held, that a judgment of a court of a state in which the cause of action did not arise, but based on an award of arbitration had in the state in which the cause did arise, is conclusive, and, under the "full faith and credit" clause of the Federal Constitution, must be given effect in the latter state, notwithstanding the award was for a claim, which could not, under the laws of that state, have been enforced in any of its courts. *Fauntleroy* v. *Lum,* 210 U. S. 230.

This decision leads to the interesting conclusion that a state may be compelled to give effect to an illegal transaction done within its borders. The court decided that the case fell within the doctrine laid down by Chief Justice Marshall in *Hampton* v. *M'Connell,* 3 Wheat. 234, "that the judgment of a state court should have the same credit, validity, and effect in every other court in the United States which it had in the state where it was pronounced, and that whatever pleas would be good to a suit thereon in such state, and none others, could be pleaded in any other court of the United States." The court held that the judgment of the Missouri court in this case was undoubtedly conclusive in Missouri on the validity of the cause of action and could not be impeached either in or out of the state by showing that it was based on a mistake of law, (*State* v. *Trammel,* 106 Missouri 510,) and therefore, as the jurisdiction of the Missouri court was not disputed, the judgment could not be impeached in Mississippi, even if it went on a misapprehension of the Mississippi law. This reasoning seems unassailable, but a strong minority of the court considered the decision as an unwarranted extension of the doctrine laid down by Chief Justice Marshall, and one which might well lead to dangerous results.

CONTEMPT.

Alleging a breach of the injunction issued in the well known case of *Sullivan* v. *Jones & Laughlin Steel Co.*, 208 Pa. 540, the plaintiffs brought this action for contempt. The testimony showed an honest, untiring effort on the part of the defendants to correct the "slips" which were so injurious to the plaintiff's property, but notwithstanding these efforts, a continuous deposit of the dust on the premises, though in less amount than formerly. The Supreme Court of Pennsylvania, overruling the lower court, held that the resulting injury did not amount to a violation of the injunction; that the present injury was not the injury enjoined, inasmuch as the present deposits were not of such a character as to destroy vegetation and kill the orchards, etc. *Sullivan* v. *Jones & Laughlin Steel Co.*, 70 Atl. 775.

Breach of Injunction

It will be remembered that when the nuisance case was originally heard, it virtually overruled the existing Pennsylvania doctrine as expressed in Richards' Appeal, 57 Pa. 105, where the court inclined toward the balance of injury test. The decision, however, placed the Pennsylvania doctrine in accord with the English cases such as *Pennington* v. *Brinsop Co.*, L. R. 5 Ch. D. 769, and *Young* v. *Bankier Dstillery Co.* App. Cas. (1893) 691, where the only consideration by the court was whether or not a right of the plaintiff was being infringed. Whether or not in acquitting of contempt the court has in some degree receded from its decision in issuing the injunction is an open question which subsequent decisions will help to decide. Justice Mestrezat in an able dissenting opinion, went even further in this view of the court's position, and held that an acquittal of contempt amounted to an overruling of the former decision, since the injury was precisely the same in nature, and differed only in degree.

CONTRACTS.

Where two telephone companies, which were non-competing, mutually gave up their lines to each other and agreed not to compete, *Held,* the contract being one for mutual protection, and in no way injurious to the public, is not illegal as being in restraint of trade. *Wayne Co.* v. *Ontario Co.*, 112 N. Y. Supp. 424.

Restraint of Trade

For a full discussion of the principles involved, see Note. p. 169 of this issue.

CONTRACTS (Continued).

Right of Assignee of Chose in Action to Sue in His Own Name

By the Common Law, the benefit of a contract could not be assigned, except by the crown, so as to enable the assignee to sue in his own name; and if such assignee were not empowered by his assignor to sue in the latter's name, he was forced into long and expensive litigation in Equity, the only court which recognized his rights (Pollock on Conts. 7th Ed., p. 217). The origin of the rule was attributed by Coke to the "wisdom and policy of the law" in discouraging maintenance and litigation; but it is better explained as a logical consequence of the archaic view of a contract as creating a strictly personal obligation between debtor and creditor (Spence, Eq. Juris. of Chy., Vol. II, p. 850), and we find Blackstone (Vol. II, p. 442) remarking that " the person to whom it (the contract) is transferred is rather an attorney than an assignee."

However useful the rule may once have been, it has now, because of our more advanced and complicated business methods, become practically obsolete, and statutes have been passed in most of our states enabling the assignee to sue in his own name, as the real party in interest.

Under the Oregon statute covering the question it has been recently held by the Supreme Court of that State that a judgment creditor having assigned the debt to a bank for collection, and the bank in turn to King, the plaintiff, the latter could maintain a suit in his own name, after the original parties had agreed on a compromise (*King* v. *Miller,* 97 Pac. Rep. 542). There are several dicta in the case, but the point in question is one that would unquestionably be followed in the majority of jurisdictions to-day.

Right of Suit After Release

"It is now a general rule, in construing releases," says C. J. Shaw (*Rich* v. *Lord,* 18 Pick. 325), "that general words, though the most broad and comprehensive, are to be limited to particular demands, where it manifestly appears by the recital, by the consideration, by the nature and circumstances of the several demands, to one or more of which it is proposed to apply the release, that it was so intended to be limited by the parties." This is a good statement of the rule usually held in cases of release, and it is generally laid down by text-book writers that a general release does not include demands which neither party had knowledge of (Parsons on Conts. 626).

CONTRACTS (Continued).

The reason for this rule seems plain: that is the intention of the parties that should govern in all such agreements, and therefore that nothing should be enforced that was not contemplated at the time. This being so, the fact that the release is under seal, should not affect the matter; but though the cases agree that in a release under seal, if the particular matter is expressed first and the general words after, the New York courts imply that if the *general* words are expressed first, all action is barred, even to actions which could not have been known at the time (*Kirchner* v. *New Home Sewing Mach. Co.*, 135 N. Y. 182). This language seems rather harsh, and the authorities cited by the learned judge in that case hardly bear out the point. There is no question, however, as to the effect of mere receipts; and the recent holding that when a cargo of goods had been delivered in apparent good order, save that a few bundles of shooks came out stained, and a compromise was effected by deducting $100, which was acknowledged by a receipt "in full settlement of our claim for damages to cargo delivered in bad condition," the plaintiffs later discovering that after the shooks had been made up into wine barrels the wine showed a flavor of creosote—the holding that the previous release did not bar a right of action for odor and taint not discovered until afterward, was perfectly sound, and unquestionable (*Church Cooperage Co.* v. *Pinkney et al.*, 163 Fed. 653).

CORPORATIONS.

Retirement of Stock: Existence Without Stockholders

Where the stockholders of a corporation retired all the old stock and issued new, leaving an interval during which there was no stock outstanding, *Held*, the existence of the corporation continued, although strictly speaking there were no stockholders during the interval. *In re Western Bank and Trust Co.*, 163 Fed. 713.

For a full discussion see Note, p. 176 of this issue.

DAMAGES.

Constitutional Law: Recovery for Death of Alien

Under the treaty with Italy, Italian subjects are given certain rights in the United States. Plaintiff brought an action under the Act of 1855 in Pennsylvania to recover for the death of her son, an Italian subject. *Held*, the statute does not extend to non-residents, and cannot be so extended by the treaty. *Fulco* v. *Schuylkill Valley Stone Co.*, 163 Fed. 124.

For a full discussion see Note, p. 171 of this issue.

EQUITY.

Injunction Against Execution Sale of Realty

An execution was levied against A and his property condemned for sale. He brought a bill to enjoin the proceedings on the ground that he was not the defendant in the execution, but that such defendant was another person having a name similar to him. *Held,* the bill cannot be entertained, the Court having no jurisdiction over the case. *Mantz* v. *Kistler, et al.,* 70 Atlantic 545.

For a full discussion see Note, p. 173 of this issue.

EVIDENCE.

Admissibility Parol Agreement Modifying Written Contract

Plaintiff contracted in writing to furnish defendant company with certain machinery. Defendant refused to accept the machinery and plaintiff sues for breach of contract. At the trial defendant offered to introduce evidence of a parol agreement entered into at the time the contract was executed to the effect that work should not be begun until specifications of certain details had been submitted by defendant, which agreement had not been complied with by plaintiff. This evidence was excluded by the trial judge. *Held,* the evidence was properly excluded. The parol agreement which it was attempted to set up was clearly inconsistent with the written contract. *Ridgway Co.* v. *Pa. Cement Co.,* 70 Atl. 557.

The general rule that parol evidence is inadmissible to vary a written contract, has been subject to more sweeping exceptions in Pennsylvania, than in any other jurisdiction. Up to the last quarter of the nineteenth century these exceptions were so broad as nearly to obliterate the rule, due largely to a misconception of fraud as applied to contract. But upon the introduction of the rule allowing parties to testify in their own behalf, the danger of so loose a doctrine with regard to parol evidence was seen, and in 1870, the case of *Martin* v. *Berens,* 67 Pa. 459, first narrowed the rule making the test of admissibility of evidence of a parol, contemporaneous, inducing agreement, whether such agreement if proven could stand with the written contract and be enforced without contradicting or varying any of its terms. Subsequent cases continued to apply a stricter rule than formerly, but not expressly on this ground, and developed the rule that parol evidence was admissible only when the agreement restricted the use of the written instrument. *Cloud* v. *Marble,* 186 Pa. 614. However, this principle was not broad enough to apply to all

EVIDENCE (Continued).

cases, and a large number were therefore decided on unsatisfactory reasoning, no court realizing that the principle of *Martin* v. *Berens* would afford a criterion for all such cases. But this rule was finally hinted at in *Fuller* v. *Law*, 207 Pa. 101, and now the principal case has been decided expressly on that ground. It is a logical rule, including the "use" doctrine, and though broader, is not so much so as to violate the sanctity of a written contract. It will also explain previous Pennsylvania cases on this subject, with the exception of those on their face wrongly decided.

See Article "Admissibility of Evidence," by Stanley Folz, Esq., in 52 Am. Law Reg. 601.

Letters from Husband in Prison to Wife Regularly Mailed and of Incriminatory Nature Not Admissible Against the Husband

Fisher, while confined in prison on a charge of murder dictated to a fellow prisoner on two separate occasions letters to Fisher's wife. The letters contained incriminating evidence against him. At the trial the letters were offered in evidence by the district attorney and received by the Court. Defendant excepted to their admission. It was not shown at the trial by the district attorney, nor was he requested to state how he got the letters. Subsequent to the trial the envelopes, in which the letters were alleged to have been enclosed, were produced and appeared to have been regularly stamped and mailed.

The majority of the Supreme Court of Pennsylvania held that the admission of the letters as evidence was a violation of the statute (Act of May 23, 1887 P. L. 158) which provided that "neither husband nor wife shall be competent or permitted to testify against each other, . . . nor shall either husband or wife be competent or permitted to testify to confidential communications made by one to another." The process of reasoning by which they arrived at this conclusion is shown by the following quotation from the opinion of Mr. Justice Elkin, "These facts clearly show that the letters were placed in due course of transmission in the mails, and the presumption arises under the rule of our own cases that letters so mailed were delivered to the party addressed. It is true the evidence does not show how the district attorney got possession of the letters, but the wife having received them, the reasonable presumption is that she gave them

EVIDENCE (Continued).

to the prosecuting officer, which, in point of fact she did, as is shown by facts subsequently developed."

A strong dissenting opinion was entered by Mr. Chief Justice Mitchell, Mr. Justice Potter concurring. The grounds for the dissent are best summed up in the following quotation: "The conclusion is jumped at by the further presumption that the wife gave them to the Commonwealth and that in so doing she was testifying to confidential relations. There is no evidence nor any presumption either of fact or of law to support such a conclusion. She might just as probably have lost them by carelessness, or by the treachery of the fellow prisoners whom the defendant trusted with them in the first place, as they testified on the stand. It is a very old and very sound law that a presumption founded on a presumption is not valid." *Commonwealth* v. *Fisher,* 221 Pa. 538 (1908).

It has been repeatedly held that although a letter from husband to wife is privileged, yet where such a letter has come into the hands of a third person it may be produced in evidence. *St.* v. *Hayes,* 140 N. Y. 484 (1894); but in a number of jurisdictions the rule is *contra; Wilkerson* v. *St.,* 91 Ga. 729 (1893); *Lancelot* v. *St.,* 98 Wis. 136 (1897); whether the letters were obtained voluntarily or against the wife's will [*Scott* v. *Commonwealth,* 94 Ky. 511, p. 515 (1893)].

In this case it was held that a letter from defendant to his wife offered in evidence by plaintiff was not competent, where it was not shown that plaintiff did not get possession of it through the agency or connivance of the wife. (*Mahner* v. *Strick,* 70 Mo. App. 380 (1897), *contra. St.* v. *Hoyt,* 47 Conn. 518, p. 540 (1880).

The Act of May 23, 1887, P. L. 158, defining competency is more than confirmatory of the common law rule. The court will take notice of such a flagrant error as permitting a husband to testify against his wife, although the error is not covered by any assignment. *Canole* v. *Allen,* 222 Pa. 156 (1908).

In view of the strict enforcement of the statute it does not seem unreasonable to place on the district attorney the burden of proving that he did not get the said letters from defendant's wife, especially as the information is often solely within his knowledge and within that of the wife.

Quaere, whether the fellow prisoners to whom the letters were dictated are to be regarded as third persons so as to destroy the privileged character of the letters or may they be regarded as defendant's amanuenses?

LIBEL.

In an action for libel, brought against a commercial agency for an honest but erroneous expression of opinion, causing damage to plaintiff, *held,* the fact that defendant published the communication as a matter of personal profit prevents its ranking in the privileged class. *Mackintosh* v. *Dunn,* L. R. (1908) App. Cas. 390.

Privileged Communication: Commercial Agency

For further particulars see Note, p. 178 of this issue.

NEGLIGENCE.

Plaintiff, the vendee of a herd of cattle, sued defendant, the owner of public stock-yards, for damages resulting from disease contracted by the cattle while in the yards. *Held,* no right of action could pass from the the vendor, in whom it had accrued, to plaintiff, the vendee, by the mere sale of the cattle. *Eshleman* v. *Union Stockyards Co.,* 222 Pa. 20.

Transfer of Action for Damages

For a full discussion of the principles involved see Note, p. 180 of this issue.

PARTNERSHIP.

Ten persons joined in the purchase of certain timber lands in Texas, each agreeing to pay $945. At the same time they formed a partnership for the purpose of manufacturing lumber posts and ties; but the business for which the partnership was formed was never carried on. The title to the real estate was taken in the name of W. J. Puett in trust for the company and he was elected secretary and treasurer. Later one of the ten partners sold his interest in the land to the plaintiff and from that date her name appears on the books of the company, and she paid from time to time her proportionate share of the taxes. She made the purchase through Puett. Subsequently Puett sold his interest to Way, one of the original partners and at the same time executed a deed conveying the real estate to him as trustee. Said conveyance was made at a meeting of all the persons interested except the plaintiff, who knew nothing about the transaction until long afterwards. Subsequently, Way, having purchased all the interests except that of the plaintiff, sold and conveyed the land without her knowledge or consent. Plaintiff sued to

Partners Construed to be Co-owners of Land Held in Trust for the Partnership

PARTNERSHIP (Continued).

recover the value of her share in said real estate. *Jones* v. *Way,* 97 Pac. 437 Kansas Supreme Court (1908).

The statement in regard to the right of a partner to dispose of his interest in the partnership without the consent of the other partners appears to a clear statement of the law but the decision is based upon the construction which the Court put upon the partnership agreement. The only question seems to be whether this construction is supported by the facts.

In England agreements to carry on business at a future time do not render the parties to them partners before they actually do carry on the business. "It is the carrying on of a business, not an agreement to carry it on, which is the test of partnership" (Lindley on Partnership, 7th Ed., p. 15; Partnership Act, 1890, Sect. 1, definition of partnership), but in this country the law seems to be that, "Partnership dates from agreement, not from beginning business under it" (Parsons on Partnership, 2nd Ed., p. 79; *Aspinwall* v. *Williams,* 1 Ohio 84 (1823).

Therefore, it would seem that the conveyance of the land to Puett "in trust for the company" passed the equitable title to the partnership unless the partnership agreement was otherwise. The Court "in view of the construction placed upon the articles of agreement by the parties in this transaction" decided that the persons held the real estate as tenants in common, and therefore each could sell his interest in the real estate at any time without the consent of his co-tenants.

SALES.

Validity of Conditional Sale

On a petition for an order for leave to foreclose a lien upon, or to bring an action for the recovery of, stoves installed in houses built by a bankrupt, the petitioner proved that the contract of sale of the stoves was conditioned upon the payment of the price. The trustee in bankruptcy objected to the granting of the order on the grounds that the stoves had, by their installation, become part of the real estate, and that the fact that they would be second-hand after heating was inconsistent with their return.

Held, that the vendor's property in the stoves before payment of the price as against the bankrupt's trustee was not impaired by the fact that use of the stoves upon the vendee's property was inconsistent with the idea of a return to the seller, nor had they necessarily become a part of the real estate incapable of continued ownership in the vendor. *In re Cohen,* 163 Fed. 444.

SALES (Continued).

This case raises a new and interesting point in regard to the retention of property by the vendor in a conditional sale. There seems to be no direct authority upon this point, but the decision appears to be sound in principle.

STATUTES.

Appropriations for Indian Education

The Indian Appropriation Acts of 1895-1899 limited and forbade the appropriation of funds for the education of Indians in sectarian schools. The question arose whether this prohibition applied to certain Treaty and Trust funds which the Commissioner appropriated for education in spite of the Acts. *Held,* that the Acts applied only to the appropriation of public money, and that the moneys in question in reality belonged to the Indians under the provisions of the Treaty, and under the nature of the Trust, and hence were not subject to the Acts. *Quick Bear* v. *Leupp,* 210 U. S. 50.

The case is unique and one practically without precedent authority. For a great number of years the government had been making contracts with sectarian schools for the education of Indians, but on account of the abuse of the system for political ends and in other ways, it was deemed best to reduce, and at length to abolish all such appropriations, and the Acts mentioned above were therefore passed. The defendant in this case renewed the appropriations from the Indian Treaty fund and from the Trust fund, and the plaintiff applied for an injunction to restrain such appropriations. It was argued for the plaintiff that the intention of Congress was clearly to prohibit all appropriations regardless of the particular fund from which they were derived. But the court sustained the contention of the defendant, namely, that since the acts were introduced under the heading "Support for Schools," they should apply only to the money appropriated under that head. As the Treaty and Trust fund appropriations had, up to that time, been made under separate heads, the prohibitions of the Acts did not, therefore, apply. It was also contended that the contracts were in violation of the undenominational spirit of the Constitution, but the Court was of opinion that since the money was in the first place the property of the Indians, they could choose whatever denomination suited them for their education.